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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 ZAURBEK GUKETLOV, et al.,

12 Plaintiffs,

13 v.

14 HOMEKEY MORTGAGE, LLC, et
al.,

15 Defendants.
16

CASE NO. C09-1265JLR

ORDER

17 This matter comes before the court on Defendant WMC Mortgage, LLC's
18 ("WMC") motion to dismiss (Dkt. # 8).¹ The parties have not requested oral argument.
19 Having reviewed the materials submitted by the parties, and for the reasons set forth
20 below, the court GRANTS WMC's motion to dismiss (Dkt. # 8), but GRANTS
21 Plaintiffs leave to amend their complaint with respect to their Washington Consumer
22 Protection Act and fraud claims.
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26 ¹ Defendant HomeKey Mortgage, LLC did not join in WMC's motion to dismiss.

I. BACKGROUND

This lawsuit arises out of Plaintiffs Zaurbek and Svetlana Guketlov's ("the Guketlovs") purchase of a home in Renton, Washington. (Declaration of James E. Howard ("Howard Decl.") (Dkt. # 9), Ex. A ("Compl.") ¶ 10.) The Guketlovs allege that they applied for a conventional fixed-rate loan through their mortgage broker, Defendant HomeKey Mortgage, LLC ("HomeKey"). (*Id.* ¶ 16.) Early in the application process, they allegedly received two Truth in Lending Disclosure Statements for fixed-rate loans. (*Id.* ¶ 17.) Sometime thereafter, but prior to closing, the Guketlovs received an additional Truth in Lending Disclosure Statement for a fixed-rate loan for \$280,270.56. (*Id.* ¶ 19.) The Guketlovs claim that they never received any disclosures before the closing date that indicated that they would receive an adjustable-rate loan. (*Id.* ¶ 20.) At closing, however, the Guketlovs allege that they were offered an adjustable-rate loan of \$287,960.00 at an initial interest rate of 7.5% for the first six months. (*Id.* ¶ 21.) The Guketlovs contend that, according to the statements accompanying the loan, they were charged a \$2,159.70 origination fee, a \$450.00 processing fee, and a \$2,879.60 "Yield Spread Premium," all of which were paid to HomeKey out of the loan proceeds. (*Id.* ¶¶ 22-24.) The Guketlovs allege that the interest rate on their loan has since increased to more than 9.75%, and that as a result they can no longer afford their mortgage payments. (*Id.* ¶ 25.)

The Guketlovs originally filed this action against WMC and HomeKey in King County Superior Court. (*See* Dkt. # 1 (Notice of Removal).) The Guketlovs claim that

1 WMC and HomeKey violated the Truth-in-Lending Act (“TILA”), 15 U.S.C. § 1601 et
2 seq., the Real Estate Settlement Practices Act (“RESPA”), 12 U.S.C. § 2607 et seq., and
3 the Washington Consumer Protection Act (“CPA”), chapter 19.86 RCW, by failing to
4 provide required disclosures and by improperly charging an origination fee and a “Yield
5 Spread Premium” based on the adjustable rate loan. (Compl. ¶¶ 27-30 (TILA and
6 RESPA cause of action); ¶¶ 31-32 (CPA cause of action).) The Guketlovs further claim
7 that they are entitled to damages for common-law fraud and unjust enrichment based on
8 material misrepresentations made by agents and representatives of HomeKey and WMC
9 during the loan application process. (Compl. ¶¶ 33-42.)

12 WMC removed the action to federal court (*see* Dkt. # 1), and filed this motion to
13 dismiss (Dkt. #8).

15 II. ANALYSIS

16 To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure
17 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a
18 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct.
19 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). It is
20 not enough for a complaint to “plead[] facts that are ‘merely consistent with’ a
21 defendant’s liability.” *Id.* (quoting *Twombly*, 550 U.S. at 557). Rather, “[a] claim has
22 facial plausibility when the plaintiff pleads factual content that allows the court to draw
23 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
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1 Although a court considering a motion to dismiss must accept all of the factual
2 allegations in the complaint as true, the court is not required to accept as true a legal
3 conclusion presented as a factual allegation. *Id.* at 1949-50 (citing *Twombly*, 550 U.S. at
4 556).

6 “In ruling on a 12(b)(6) motion, a court may generally consider only allegations
7 contained in the pleadings, exhibits attached to the complaint, and matters properly
8 subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). A
9 court may, however, “consider a writing referenced in a complaint but not explicitly
10 incorporated therein if the complaint relies on the document and its authenticity is
11 unquestioned.” *Id.*; *see also Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994),
12 *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127
13 (9th Cir. 2002).

16 In the event the court finds that dismissal is warranted, the court should grant the
17 plaintiff leave to amend unless amendment would be futile. *Lopez v. Smith*, 203 F.3d
18 1122, 1127 (9th Cir. 2000).

20 **A. TILA and RESPA Claims**

21 WMC argues that the court should dismiss the Guketlovs’ TILA and RESPA
22 claims because they are time-barred. (Mot. at 4-5.) A claim for monetary damages
23 under TILA “may be brought . . . within one year from the date of the occurrence of the
24 violation.” 15 U.S.C. § 1640(e). A TILA violation occurs at the time the loan
25 documents are signed. *See Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th
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1 Cir. 2003). Similarly, an action brought pursuant to 12 U.S.C. § 2607(a), the anti-
2 kickback and unearned fees provision of RESPA, is subject to a one-year statute of
3 limitations, which starts to run on the date that the loan closed. 12 U.S.C. § 2614; *see*
4 *also Kotok v. Homecomings Fin., LLC*, No. C09-662RSM, 2009 WL 2057046, at *3
5 (W.D. Wash. July 14, 2009).
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7 The Guketlovs' loan closed on May 12, 2006. (*See* Compl. ¶¶ 18, 25.) Because
8 the Guketlovs filed their complaint on May 12, 2009, three years after their loan closed,
9 their TILA and RESPA claims are barred by the statutes of limitations.
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11 The Guketlovs argue that they are not subject to the one-year TILA statute of
12 limitations because their complaint includes claims for recoupment and set-off of their
13 loans. (Resp. (Dkt. # 11) at 5; *see* Compl. at 7.) The Guketlovs are correct that TILA's
14 one-year statute of limitations does not apply "in an action to collect the debt . . . as a
15 matter of defense by recoupment or set-off in such action." 15 U.S.C. § 1640(e). The
16 Guketlovs, however, are *affirmatively* claiming recoupment and set-off in an action that
17 they initiated; they are not asserting the *defenses* of recoupment and set-off in an action
18 to collect a debt. The one-year statute of limitations therefore bars their claims. *See*
19 *Kotok*, 2009 WL 2057046, at *3.
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22 The Guketlovs also insist that they are entitled to equitable tolling of the statutes
23 of limitations on their TILA and RESPA claims "due to the fraud alleged in [their]
24 complaint." (Resp. at 6). The statutes of limitations under TILA and RESPA may be
25 subject to equitable tolling in appropriate circumstances. *See King v. California*, 784
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1 F.2d 910, 915 (9th Cir. 1986) (TILA); *Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp.
2 2d 1091, 1107 (W.D. Wash. 2007) (RESPA). Equitable tolling “focuses on excusable
3 delay by the plaintiff,” *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002), and
4 inquires whether “a reasonable plaintiff would . . . have known of the existence of a
5 possible claim within the limitations period,” *Santa Maria v. Pacific Bell*, 202 F.3d
6 1170, 1178 (9th Cir. 2000). *See also King*, 784 F.2d at 915 (the limitations period for
7 TILA is “suspended only until the borrower discovers or had reasonable opportunity to
8 discover the fraud or nondisclosures that form the basis of the . . . action.”).

11 Here, the Guketlovs’ bare allegation that Defendants’ fraud prevented them from
12 discovering the violations within the limitations period is insufficient to withstand a
13 motion to dismiss. *Cf. Blaylock*, 504 F. Supp. 2d at 1108 (holding that plaintiffs were
14 entitled to equitable tolling of their RESPA claim where they alleged that they could not
15 have reasonably discovered the defendant title insurance company’s deceptive practices
16 until the Washington State Insurance Commissioner issued a report detailing marketing
17 abuses by the title insurance industry). The Guketlovs make no factual allegations that
18 would support a finding that a reasonable plaintiff would not have known that he
19 received inadequate disclosures at the time he closed on his loan. *See Kotok*, 2009 WL
20 2057046, at *3. The Guketlovs are not, therefore, entitled to equitable tolling of the
21 statutes of limitations on their TILA and RESPA claims against WMC.

25 For the foregoing reasons, the court dismisses the Guketlovs’ TILA and RESPA
26 claims as time-barred.

1 **B. Washington Consumer Protection Act**

2 WMC argues that the court should dismiss the Guketlovs' CPA claim for failure
3 to state a cause of action. (Mot. at 5-6.) To state a claim under the Washington CPA, a
4 plaintiff must allege the following elements: (1) an unfair or deceptive practice, (2)
5 occurring in trade or commerce, (3) affecting the public interest, (4) injuring plaintiff in
6 his business or property, and (5) caused by the unfair or deceptive act. *Hangman Ridge*
7 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986). The
8 “unfair or deceptive practice” element requires a plaintiff to show that the alleged act
9 “had the capacity to deceive a substantial portion of the public.” *Id.* at 535 (emphasis
10 omitted). Courts evaluating the “public interest” element consider such factors as
11 whether the alleged acts were committed in the course of the defendant’s business,
12 whether the defendant advertised to the public in general, whether the defendant actively
13 solicited the plaintiff, and whether the plaintiff and defendant occupied unequal
14 bargaining positions. *Id.* at 538.

15 WMC argues that the Guketlovs' complaint failed to specify the deceptive
16 practices in which WMC is alleged to have engaged and failed to allege specific facts
17 demonstrating a plausible claim to relief as required by *Twombly* and *Iqbal*. (Mot. at 5-
18 6). The court agrees. The Guketlovs pleaded their CPA claim with a single, conclusory
19 sentence: they allege that “[t]he conduct of Defendants HomeKey Mortgage, LLC, and
20 WMC Mortgage Corp., their agents and representatives constitute unfair or deceptive
21 acts or practices in violation of the Washington Consumer Protection Act” (Compl.
22 23 24 25 26

¶ 32.) The Guketlovs do not allege facts that, if true, would demonstrate that WMC's conduct had the capacity to deceive a substantial portion of the public, nor do they make any allegations regarding how WMC's alleged unfair or deceptive practices affect the public interest. *See Hangman Ridge*, 719 P.2d at 535, 538.

The Guketlovs also argue that “[t]he violations of TILA and RESPA, as alleged in plaintiffs’ complaint, constitute prima facie violations of the CPA.” (Resp. at 6.) It is true that a violation of certain statutes containing a “specific legislative declaration” of a public interest may satisfy the public interest element of the CPA per se. *See Hangman Ridge*, 719 P.2d at 538-39. The Guketlovs have not, however, pointed the court to any authority showing that a violation of TILA or RESPA satisfies the CPA’s public interest element.

The court therefore finds that dismissal of the Guketlovs’ CPA claim against WMC is warranted. Because the court does not find that amendment would be futile, however, the court grants the Guketlovs leave to amend their complaint with respect to their CPA claim. *See Lopez*, 203 F.3d at 1127.

C. Common-law Fraud

WMC argues that the court should dismiss the Guketlovs’ claim of common-law fraud because they failed to plead it with the particularity required by Federal Rule of Civil Procedure 9(b). (Mot. at 6-7.) Under Washington law, a claim for fraud has the following nine elements: “(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the speaker that it should

1 be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's
2 reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9)
3 damages suffered by the plaintiff." *Stiley v. Block*, 925 P.2d 194, 204 (Wash. 1996).
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5 To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a
6 complaint must plead allegations of fraud with particularity. Fed. R. Civ. P. 9(b). The
7 complaint must include "an account of the 'time, place, and specific content of the false
8 representations as well as the identities of the parties to the misrepresentations.'" *Swartz*,
9 476 F.3d at 764 (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th
10 Cir. 2004)). Moreover, "Rule 9(b) does not allow a complaint to merely lump multiple
11 defendants together but requires plaintiffs to differentiate their allegations when suing
12 more than one defendant and inform each defendant separately of the allegations
13 surrounding his alleged participation in the fraud." *Id.* at 764-65 (internal quotation and
14 edits omitted). Thus, where, as here, a fraud suit involves multiple defendants, "a
15 plaintiff must, at a minimum, identify the role of each defendant in the alleged
16 fraudulent scheme." *Id.* at 765 (internal quotation and edits omitted).
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20 Here, the Guketlovs have not pleaded their allegations of WMC's fraud with the
21 particularity necessary to satisfy Rule 9(b). As WMC points out, the allegations in the
22 complaint lump both Defendants together. (*See, e.g.*, Compl. ¶ 37 ("Defendants
23 HomeKey and WMC Mortgage caused plaintiffs to pay to Defendant WMC Mortgage
24 [a] 'Yield Spread Premium' of \$2,879.60 which was not properly disclosed in the related
25 HUD 1 Settlement Statement."); *see generally* Compl. ¶¶ 33-42.) Because the
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1 Guketlovs' complaint does not differentiate WMC's role in the alleged fraudulent
2 scheme from HomeKey's role, it does not meet the requirements of Rule 9(b). *See*
3 *Swartz*, 476 F.3d at 764-65.²
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5 For these reasons, the court grants WMC's motion to dismiss the Guketlovs'
6 fraud claim. The court grants the Guketlovs leave to amend their complaint with respect
7 to their fraud claim.
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9 **D. Unjust Enrichment**

10 WMC argues that under Washington law, a party may not bring an unjust
11 enrichment claim where an express contract governs the relationship between the
12 parties. (Mot. at 7.) Indeed, "[a] party to an express contract is bound by the provisions
13 of that contract and may not disregard the same and bring an action on an implied
14 contract relating to the same subject matter, in contravention of the express contract."
15 *MacDonald v. Hayner*, 715 P.2d 519, 522 (Wash. Ct. App. 1986). WMC urges the court
16 to dismiss the Guketlovs' unjust enrichment claim because the claim relates to the same
17 subject matter as the loan contract between the Guketlovs and WMC: "the deed of trust
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20 ² WMC also argues that the Guketlovs' allegation of fraud is contradicted by the
21 Guketlovs' own loan application. (Mot. at 6-7; Reply (Dkt. # 13) at 7-8.) With its motion,
22 WMC submitted a copy of an application, purportedly signed by Mr. Guketlov, for an
23 adjustable-rate loan of \$287,960 at a starting rate of 7.5%. (Howard Decl., Ex. B.) The
24 Guketlovs respond that they received "forged or altered" documents in connection with their
25 loan. (Resp. at 4.) To support this allegation, the Guketlovs submitted copies of two
26 applications for fixed-rate loans of \$71,990—an amount which was never mentioned in the
complaint. (Declaration of Bruce M. Hull ("Hull Decl.") (Dkt. # 12), Ex. B.) Because the
Guketlovs challenge WMC's submission, and because the Guketlovs submitted documents that
were not referenced in the complaint, the court declines to consider the parties' submissions in
conjunction with this motion to dismiss. *See Swartz*, 476 F.3d at 763.

1 and note arising out of the loan transaction.” (Mot. at 7.) The Guketlovs do not address
2 this portion of WMC’s brief in their response.

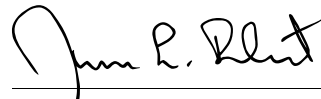
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4 The court agrees with WMC. The Guketlovs’ express contract with WMC bars
5 them from bringing an unjust enrichment claim relating to the loan contract. *See*
6 *MacDonald*, 715 P.2d at 522. The court therefore dismisses with prejudice the
7 Guketlovs’ unjust enrichment claim against WMC.

8 9 **III. CONCLUSION**

10 For the reasons set forth above, the court:

- 11 1. GRANTS WMC’s motion to dismiss (Dkt. # 8);
- 12 2. DISMISSES with prejudice the Guketlovs’ TILA, RESPA, and unjust
13 enrichment claims;
- 14 3. DISMISSES with leave to amend the Guketlovs’ Washington CPA and
15 common-law fraud claims; and
- 16 4. ORDERS the Guketlovs to file an amended complaint within 20 days of
17 entry of this order.
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20 Dated this 9th day of November, 2009.

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24 JAMES L. ROBART
25 United States District Judge
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